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No. 92-774

In the Supreme Court of the United States of America

OCTOBER TERM, 1992

ROBERT E. DAVIS,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITIONER'S REPLY BRIEF

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SUMMARY OF REPLY

I. Respondent has been inconsistent in its position in this Court and in the courts below.

II. Respondent has ignored a pivotal issue.

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PETITIONER'S REPLY BRIEF

Petitioner Robert E. Davis files this Reply Brief to clarify the issues and prior proceedings in this case.

I. RESPONDENT HAS BEEN INCONSISTENT IN ITS POSITION IN THIS COURT AND IN THE COURTS BELOW.

Respondent's Brief demonstrates that the government has wavered as to the correct answers to the questions raised in Petitioner's Petition for a Writ of Certiorari. The issues in this case are (1) "the appropriate significance to be accorded to a predicate state law offense under the Travel Act," and (2) "the correct *mens rea* standard for conviction under the Travel Act." Respondent has taken a novel position on these issues in its Brief position that ignores the government's approaches in both the trial court and the court below. The government's new argument as to the elements of a Travel Act violation should compel this Court to intervene and to protect the due process rights of Petitioner and other citizens.

Petitioner has demonstrated that there are substantial differences among the appellate courts as to what elements the government must prove to sustain a Travel Act conviction where a state crime is the only charged predicate offense. Some of the appellate courts have held that proof of a violation of underlying state law is an "element" of a Travel Act violation, while others have stated that the state law serves a merely "definitional" purpose. Other courts of appeals have established an uneasy "intermediate" position that combines the first two standards.

Petitioner argued in the trial court, the court of appeals, and this Court that the element approach was the correct standard. Respondent previously argued that a completed state crime was not necessary to support a Travel Act conviction. The trial court and the court below addressed the issue on that basis. Respondent took the position for the first time in this Court that Respondent, the trial court, and the court of appeals all confirmed that Petitioner violated the Wyoming bribery statute. The record belies this position. Thus, we are left with a clouded standard for determining how the Travel Act may be violated.

A. Respondent has Misconstrued the Opinion Below.

In its Brief, Respondent declared to this Court that the court of appeals held that Petitioner actually violated the Wyoming bribery statute. Those contentions included the following:

1. "The court of appeals was careful to hold that petitioner's conduct actually violated the underlying state bribery statute."
   (Brief, p. 7)

2. The court below held that "petitioner's purchase for a loss of a house belonging to the Wyoming Insurance Commissioner in an attempt to obtain a favorable regulatory climate for petitioner's insurance business constituted a violation of the Wyoming statute."
   (Brief, p. 7)

3. "[T]he court of appeals found that petitioner's purchase of the house in an attempt to obtain favorable regulatory treatment from Taylor constituted a violation of the Wyoming bribery statute."
(Brief, p. 9)

Importantly, Respondent did not substantiate its conclusory assertions with citations to the record. A thorough review of the record confirms that there is no basis for the statements. In fact, the excellent analysis of the government's evidence by the court below to support its reversal of Petitioner's conspiracy conviction makes short work of any "completed bribery" theory. Respondent has now completely changed the thrust of its argument in a manner that is not supported by the record. This method is both inequitable and prejudicial to Respondent. This Court should intervene to ensure that Petitioner is treated in a more just manner.

B. Respondent has Misstated its Position in the Court Below.

Respondent stated in its Brief in this Court that the government proved that Petitioner committed a bribe. Respondent took the contrary position before the court of appeals. Indeed, Respondent contended at least seven times in its brief in the court of appeals that it did not have to prove that a bribe took place, and that Petitioner's assertions to the contrary were wrong. Respondent stated:

1. "[T]he Government did not bear the additional burden of demonstrating that the actual offense of bribery as defined by Wyoming law was in fact completed."
(Respondent's Brief on Appeal, p. 19)

2. "In this regard, it should be noted that the Travel Act count in the indictment does not allege that

the actual bribery of Taylor was accomplished . . . . Defendant's notion that he was somehow unfairly misled into believing the Government's case necessarily rested on proof of a completed or accomplished bribe is simply not supportable on this record."
(Respondent's Brief on Appeal, p. 19, footnote 18)

3. "Likewise, the Defendant's many references to the trial court's pretrial Order on motions as somehow 'requiring' the Government to prove a completed violation of the underlying state statute is also wrong."
(Respondent's Brief on Appeal, p. 19, footnote 18)

4. "[T]his court must judge the trial court's comment to the effect that, had he been judging this case based specifically on a charge of bribery under the Wyoming statute, he might have been inclined to grant the motion for acquittal."
(Respondent's Brief on Appeal, pp. 19-20)

5. "The trial court clearly understood that proof of the ultimate accomplishment of the offense of bribery as defined by state law was simply not required of the Government in the context of this Travel Act prosecution. As noted above, his understanding in that regard was correct."
(Respondent's Brief on Appeal, p. 20)

6. "[T]he Government's burden of proof with respect to a Travel Act charge does not include satisfaction of each and every element of the underlying state law violation . . . . "
(Respondent's Brief on Appeal, p. 20)

7. "§ 1952 does not require that the unlawful activity actually be accomplished . . . ."
(Respondent's Brief on Appeal, p. 46)

These assertions glaringly contradict the statements that Respondent has made to this Court that it actually proved a violation of the Wyoming bribery statute. Thus, it is reasonable to conclude that even Respondent is confused about the correct standards in this case. This Court should grant Petitioner's Application for a Writ of Certiorari to define the proper approach.

C. The Court of Appeals did not Hold That Petitioner's Conduct Actually Violated the Underlying State Bribery Statute.

Without citing to the record, Respondent has made multiple representations to this Court that the court below held that Petitioner actually violated the Wyoming bribery statute. In fact, the court of appeals specifically held that the government does not have to prove the violation of underlying state law in order to secure a conviction under the Travel Act. (Opinion of the Court of Appeals, Appendix A to Petition, pp. A-7, A-8, A-23.)

The central issue in this case is whether Respondent had to prove a violation of the Wyoming bribery statute to support its Travel Act offense, in light of the fact that the Wyoming bribery statute was the only underlying criminal offense charged. The government's entire case rested on the premises that Petitioner sent money in interstate commerce to effect the purchase of a home that belonged to the state insurance commissioner, and that the purchase was a bribe under Wyoming law. The indictment charged a violation of the Travel Act solely by way of a violation of the underlying state offense of bribery. The government opened and closed its case with the assertion that the purchase of Commissioner Taylor's home was a bribe. As confirmed by the opinion of the court below, the evidence completely failed to establish a bribe.

If Petitioner did not violate the Wyoming bribery statute, what offense did he commit? The purchase of a home, effected by an interstate wire transfer, in and of itself is not normally viewed as a criminal act. The court below suggested that all that is necessary to commit a Travel Act violation under these facts is that Petitioner must have had a "subjective intent" to bribe Mr. Taylor. Petitioner submits that such a standard is inappropriate under the facts of this case and under the language of the Wyoming bribery statute, which seems to suggest that to violate the statute, the briber and bribee must agree that the briber will give the bribee something of value, in a contemporaneous exchange for the bribee's vote or other action.

To prove bribery under Wyoming law, the government should have been required to prove that Petitioner gave Commissioner Taylor something of value as a specific *quid pro quo*. The Wyoming statute language literally requires proof that the offeror sought to influence some action "in consideration for" the public servant's vote, exercise of discretion or other action in his official capacity. Even the government's liberal use of circumstantial evidence occurring over a five-year period as a means of divining Petitioner's subjective intent failed to show evidence of a bribe—particularly in view of the fact that the government's own witness, the alleged bribee, testified that there was no bribe and that he never did anything for Petitioner.

The Travel Act has been judicially expanded far beyond the legislative intent that it only be used in organized crime cases. Justice Department officials testified that there was no danger that the Travel Act would ever be used against average citizens who were conducting legitimate business in interstate commerce. The legislative history of the Travel Act also demonstrates that Congress had substantial concerns that the statute would be too broad and that the government might be able to charge an offense based upon one's impure thought. Under the subjective intent analysis

set forth in the opinion below, it appears that if Petitioner had an "impure thought" in the form of an expectation of some undefined future benefit from Mr. Taylor when he purchased the house, the intent element under the Travel Act was satisfied. A subjective intent standard extends the scope of the Travel Act well beyond its Congressional mandate and poses serious due process issues. Congressional concerns over the creation of a crime based on impure thoughts appear to have been well-founded under the facts of this case, as an impure thought coupled with interstate activity supplies the only basis for conviction under the Travel Act. This case provides an excellent vehicle for this Court (1) to examine the "subjective intent" standard set forth by the court below, and (2) to resolve the muddled and inconsistent manner in which various courts of appeals have decided whether an underlying state crime is a necessary element of the Travel Act where it is the only substantive criminal offense charged.

The government has argued this pivotal issue in two opposite fashions that only serve to highlight the confusion over the elements of a Travel Act violation. Considerations of justice and fairness mandate that this Court prevent Respondent from arguing the issue both ways in the same case in two separate tribunals, especially when one of them is this Court. This Court should grant Petitioner's Petition for a Writ of Certiorari to resolve the inconsistency.

II. RESPONDENT HAS IGNORED A PIVOTAL ISSUE.

Respondent now contends that the court below held that Petitioner actually violated the Wyoming bribery statute. Respondent apparently has not recognized, however, that the court below reversed Petitioner's conviction for conspiracy to violate the Travel Act because the evidence was insufficient to support such a conviction. The reversal raises a critical question: If the evidence was insufficient even to

support a conspiracy to violate the Travel Act, then how could the evidence support the government's new position that it actually proved a bribe? The trial judge apparently had the same question, since he opined that if this case were a state bribery case, he would have dismissed it.

In short, what crime is committed where a person buys a house in interstate commerce and the government alleges, yet fails to prove, the only crime charged—that the purchase was a violation of the state bribery statute? The court below seemed to believe that Petitioner's purchase of the house with the expectation of some future benefit was sufficient to convict him under the Travel Act. The opinion below suggested that Petitioner's subjective intent was the appropriate standard for sustaining a conviction under the Travel Act. Respondent failed to address this critical issue. This Court should remedy the obvious infirmity in Petitioner's Travel Act conviction by granting his Petition for a Writ of Certiorari.

III. CONCLUSION.

Respondent has taken a novel position in this Court that is unsupported by anything in the record and is in fact inconsistent with the government's position in the courts below. As a result, issues raised by Petitioner remain unchallenged. Respondent's approach confirms that the manner in which the trial court, the court of appeals, and until now, the Respondent, addressed this case are insupportable.

Moreover, it appears that the government cannot decide how the Travel Act should be construed. If the government cannot adopt a consistent articulable position on the fundamental legal issues raised in this case, then it is difficult to envision how private citizens can be protected from prosecution under the subjective intent standard embodied in the opinion below. Petitioner asserts that there is now even more support for his Petition for a Writ of Certiorari.

Respectfully submitted,

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